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Nos. 86-239 and 86-608

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1) authorizes the Environmental Protection Agency (EPA) to promulgate pretreatment standards applicable to industrial discharges into publicly owned treatment works. Section 307(b)(1) also provides that EPA may permit revision of pretreatment requirements to reflect removal of toxic pollutants achievable by publicly owned treatment works as long as those "removal credits" do not prevent sludge use or disposal by such works in accordance with Section 405 of the Act, 33 U.S.C. 1345. The questions presented are:

1. Whether the court of appeals exceeded its jurisdiction, conferred by Section 509(b)(1) of the Clean Water Act, 33 U.S.C. (Supp. II) 1369(b)(1), in ruling that EPA could not promulgate a removal credit rule under Section 307(b) of the Act because EPA had not yet promulgated comprehensive sludge regulations under Section 405 of the Act.

2. Whether EPA may allow removal credits under Section 307(b)(1) prior to promulgating comprehensive sludge regulations pursuant to Section 405.

3. Whether the court of appeals erred in setting aside EPA's determination that, for the purposes of allowing removal credits, the consistent rate of removal of pollutants by publicly owned treatment works can be measured by the average rate of removal achieved by the works.

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OPINION BELOW

The opinion of the court of appeals (86-239 Pet. App. A1-A69) is reported at 790 F.2d 289.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1986. The petition for a writ of certiorari in No. 86-239 was filed on August 15, 1986. The petition for a writ of certiorari in No. 86-608 was filed on October 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are set forth in the appendix to the petition for a writ of certiorari in No. 86-239 (Pet. App. A55-A57).

STATEMENT

1. This case concerns the validity of pretreatment standards promulgated by the Environmental Protection Agency (EPA) pursuant to Section 307(b) of the Clean Water Act, 33 U.S.C. 1317(b). The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, divides industrial facilities into two groups: direct dischargers into the waters of the United States and indirect dischargers into sewer systems that lead to publicly owned treatment works (POTWs). Direct dischargers are regulated through the National Pollutant Discharge Elimination System permit program (NPDES or Section 402 permit, 33 U.S.C. 1342). The terms and conditions of a NPDES permit are governed by effluent limitations guidelines (see 33 U.S.C. 1314) and by relevant state water quality standards (see 33 U.S.C. 1312). POTWs also are regulated by the NPDES permit system, and for some pollutants that industrial plants discharge, POTWs provide a level of treatment that is equiva-

lent to that required of direct dischargers under the industrial NPDES program.

Congress, however, recognized that POTWs generally were not designed to treat all forms of industrial pollutants. In Section 307(b), Congress directed the Administrator to issue regulations "establishing pretreatment standards" for "those pollutants which are determined not to be susceptible to treatment" by POTWs or "which would interfere with the operation" of POTWs. Congress also recognized that POTWs often do remove at least some offending pollutants. Hence, Congress also authorized POTWs to grant industries "removal credits"—*i.e.*, revisions to the applicable pretreatment standards to reflect the level of pollutant removal by the POTWs (*ibid.*). Under Section 307(b)(1), these credits are available (1) if the combined level of treatment by the indirect discharger and the POTW is equivalent to the effluent limitations imposed on the comparable direct discharger and (2) if the granting of a credit does not "prevent sludge use or disposal" in accordance with Section 405 of the Act (33 U.S.C. 1345). Section 405, in turn, addresses disposal of sewage sludge. Section 405(e) states that the manner of disposal or use of sludge is a local determination, but use or disposal may not violate guidelines established by the EPA Administrator. Section 405(d) states that the Administrator "shall develop and publish * * * regulations providing guidelines for the disposal of sludge."

In 1979, EPA first promulgated sludge criteria pursuant to Section 405(d) for landfilling, land application, and incineration. See 44 Fed. Reg. 53460 (1979) (codified at 40 C.F.R. Pt. 257). Sludge disposal is also regulated by a variety of statutes de-

pending upon the method of disposal. For example, ocean dumping of sludge requires a permit under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, and sludge incineration is regulated by Section 111 of the Clear Air Act, 42 U.S.C. 7411. EPA has consistently interpreted the Section 307(b) requirement that removal credits not prevent the use or disposal of sludge to mean that whatever use or disposal the POTWs make of their sludge, they must comply with all applicable federal, state, and local requirements, not just whatever guidelines EPA may have explicitly promulgated under Section 405(d). See 43 Fed. Reg. 27749 (1978); 40 C.F.R. 403.7(a)(3)(iv).

2. In 1978, EPA promulgated General Pretreatment Regulations that established the administrative framework for all indirect dischargers, including provision for removal credits (see 43 Fed. Reg. 27736 (1978)).[1] The Natural Resources Defense Council, Inc. (NRDC) and various industry groups sought review of those regulations in the Court of Appeals for the District of Columbia Circuit. This litigation was stayed pending a settlement agreement with the industry petitioners in which EPA agreed to propose changes to the 1978 regulations. EPA subsequently published revised regulations on January 28, 1981 (see 46 Fed. Reg. 9404), which both NRDC and industry groups challenged by filing petitions for review that were heard in the Third Circuit. In *National Ass'n of Metal Finishers* v. *EPA (NAMF)*,

[1] EPA has also promulgated categorical regulations for many industries to establish pretreatment standards for the pollutants discharged by those industries. EPA plans to promulgate additional categorical regulations for several industries.

719 F.2d 624 (1983), rev'd in part *sub nom. Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), the Third Circuit upheld the removal credit provisions of the regulations but set aside other portions of the regulations, including the "fundamentally different factor" variance provision for pretreatment standards. The latter ruling was reversed by this Court in *Chemical Manufacturers Ass'n.*

In 1984, EPA promulgated revisions to the removal credit provisions of the pretreatment regulations (see 49 Fed. Reg. 31212). These revisions, inter alia, (1) changed the measure of "consistent removal" of pollutants, for the purpose of calculating the appropriate credit, from removal rates attained at least 75% of the time to average removal rates; (2) eliminated the adjustment for storm water bypass of the POTW; and (3) provided that removal credit authorization would not be withdrawn during the effective period of a POTW's NPDES permit, except in instances of substantial under-removal of pollutants. During the comment period, NRDC claimed that EPA should not authorize removal credits because a comprehensive set of Section 405 sludge regulations had not been promulgated (86-239 Pet. App. A6-A7).

On review, the Third Circuit held that EPA's removal credit rule was arbitrary and capricious in several respects (86-239 Pet. App. A1-A55).[2] First, the court ruled that the rule did not provide for consistent removal of pollutants equivalent to the removal achieved by direct dischargers. The court

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[2] Petitioners are the Chemical Manufacturers Association, Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and related entities that intervened as respondents in the court of appeals.

found that basing credits on average removal rates achieved by POTWs meant that when the plants were operating at below average performance, the dischargers would exceed the daily or monthly effluent limitations applicable to direct dischargers (*id.* at A29). Second, the court disapproved of EPA's decision to ignore the effects of storm water bypasses of the treatment plant. EPA had estimated that such bypasses contributed approximately eight percent of the pollutants discharged by the system and dismissed this effect as de minimis, but the court of appeals disagreed and found that EPA had ignored the variability of this factor among POTWs (*id.* at A41). Third, the court set aside EPA's determination not to withdraw removal credits except for substantial underremoval of pollutants. The court concluded that under that policy the limits imposed on direct dischargers would not be equivalent to the limits imposed on indirect dischargers and POTWs, as required by the Clean Water Act (*id.* at A46). Finally, the court of appeals held that EPA erred in authorizing the issuance of removal credits prior to promulgating a comprehensive set of sludge regulations pursuant to Section 405. The court determined that NRDC was not precluded from raising this challenge by the 90-day review period in Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), even though NRDC might have raised the issue in response to earlier rulemakings (86-239 Pet. App. A49). On the merits, the court noted that EPA had acknowledged that additional sludge rules were necessary. The court also concluded that EPA's "device of incorporating other regulations" did not meet the requirements of Section 405 (86-239 Pet. App. A52).

ARGUMENT

The decision of the court of appeals is erroneous and may impose additional, ultimately unnecessary, costs on industrial indirect dischargers that must comply with pretreatment standards under the Clean Water Act. Nevertheless, we cannot conclude that further review by this Court is warranted, since EPA rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision.

1. Petitioner Chemical Manufacturers Association (CMA) asserts that the court of appeals lacked jurisdiction under Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), to review the adequacy of the Section 405 sludge regulations. CMA argues, first, that promulgation of regulations under Section 405 of the Act is not one of the "Administrator's action[s]" expressly made reviewable in the court of appeals by Section 509(b) (see Pet. 14) and, second, even if promulgation of Section 405 regulations was reviewable, NRDC's challenge in early 1985 was time-barred because NRDC failed to seek review of the regulations, issued in 1979 and amended in 1981, within 90 days as required by Section 509(b) (see Pet. 17).

We do not believe, however, that this case presents a proper vehicle for considering the claimed limitation on a court of appeals' jurisdiction imposed by Section 509(b). The issue before the court of appeals was not whether to compel the Agency to promulgate regulations under Section 405; such an issue, as petitioner CMA points out (Pet. 15), could only be raised, in the first instance, in a district court. See 33 U.S.C. 1365. Instead, the issue before the court of appeals was whether EPA was authorized by statute

to adopt a removal credits program under Section 307(b) of the Act. Section 509(b)(1)(C) explicitly provides that "[r]eview of the Administrator's action * * * in promulgating any * * * pretreatment standard under section 307 * * * may be had [in the court of appeals]," and hence, apart from timeliness concerns, we do not dispute that the court of appeals had jurisdiction over NRDC's challenge to the removal credit rule.

Second, although we disagree with the court of appeals' ruling that NRDC's challenge to the removal credit program is timely,[3] that ruling is limited to the unusual circumstances presented by this case and it is, therefore, relatively unimportant. As the court of appeals observed, Section 509(b) permits late challenges to administrative actions "on 'grounds which arose after' " the 90-day period for petitioning for review has expired (86-239 Pet. App. A49). While we disagree with the court's finding that the lengthy delay in promulgating additional Section 405 regulations qualified NRDC's challenge under this exception (*ibid.*), that determination is not of sufficient significance to warrant this Court's review.[4]

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[3] We argued below that NRDC's lawsuit was untimely because the legal basis for NRDC's current challenge to the removal credit provision—the absence of comprehensive Section 405 sludge guidelines—had existed as well in 1978 (when EPA first promulgated removal credit regulations) and NRDC had failed to assert that ground in its earlier challenge to the 1978 pretreatment regulations.

[4] We strongly disagree with the court of appeals' suggestion (86-239 Pet. App. A48) that the changes made by the 1984 rule and the reprinting of the rule in its entirety authorized a challenge after the 90-day period set forth in Section 509(b) to removal credit provisions that were not changed in 1984.

2. Petitioner CMA also asserts (Pet. 17, 22) that the court of appeals' decision to set aside EPA's reasonable, long-standing interpretation of the Clean Water Act was contrary to the rationale of *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), and *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). We agree that the court of appeals should have deferred to EPA's interpretation of the relationship between Section 405 sludge regulations and the removal credits provisions of Section 307(b). The court of appeals' blanket reliance (86-239 Pet. App. A31) on the Senate Report (S. Rep. 95-370, 95th Cong., 1st Sess. 57-58 (1977)) to support its interpretation is, moreover, misdirected because the Conference Committee substantially rejected the Senate version of the relevant provisions when the Committee fashioned the Conference bill ultimately enacted in 1977. See H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 86-88 (1977).

We also share petitioner CMA's concern that the court of appeals' decision threatens to impose hardships on the regulated community. By forbidding removal credits in the absence of more comprehensive Section 405 sludge guidelines, the court of appeals' decision will force some individual indirect dischargers, which must comply now or in the near future with categorical pretreatment standards, to invest in pollution control systems that may ultimately be unnecessary once EPA has promulgated Section 405 sludge guidelines and made removal credits available.

Nevertheless, we do not urge further review. It is our view that, ultimately, disruption to the pretreatment program can be substantially cured by promulgation of the Section 405 regulations required by the court of appeals. As noted by petitioner CMA (Pet.

11-12), the EPA regulatory agenda had Section 405 regulations scheduled for promulgation in September 1987. The Agency, however, will not be able to meet that timetable. The earliest it now expects to be able to *propose* Section 405 regulations is August 1987. This rulemaking is one of the most complex on which the Agency is working; it raises issues that affect many of the Agency's programs under a host of federal environmental laws. We acknowledge that the unavailability of removal credits during the interim will impose a significant impact on some members of the regulated community. Because, however, the Agency is presently engaged in the process of filling the regulatory gap perceived by the court of appeals, we do not believe that the legal issues presented warrant further review.

3. Petitioners Chicago Association of Commerce and Industry, et al. (CACI), also seek review of that portion of the court of appeals' ruling that struck down the use of POTWs' average removal rate to calculate the appropriate "removal credit" (86-608 Pet. 4). Petitioner CACI asserts that the court of appeals' decision mandates compliance with the monthly and daily discharge limitations imposed on direct dischargers (*id.* at 5). We believe that the relationship between the effluent limitations in a direct discharger's NPDES Permit and the calculation of allowable removal credits available to an indirect discharger is quite complex, given the existing methodology for calculation of POTW removal rates. The court of appeals' decision is quite explicit in ruling that the use of average removal rates to calculate removal credits does not provide for consistent removal of pollutants equivalent to the level of treatment required of direct dischargers (86-239 Pet. App.

A46). Precisely what showing of consistent removal would be required should EPA promulgate new removal credit regulations, however, is not clearly stated in the court of appeals' opinion.[5] In these circumstances, we believe it appropriate to await the judicial response to the promulgation of new regulations rather than for this Court to undertake review of the issue now.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[5] We note that in *NAMF* v. *EPA*, 719 F.2d 624 (3d Cir. (1983)), the court of appeals upheld removal credit regulations that were based on the removal rates achieved by the POTW 75% of the time.

* The Solicitor General is disqualified in this case.

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